

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

ROLLIE LUNSFORD, and)	
ROGER LUNSFORD,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 05-CV-0218-CVE-FHM
)	
THE BOARD OF COUNTY)	
COMMISSIONERS of the COUNTY OF)	
ROGERS, STATE OF OKLAHOMA, and)	
MIKE HELM, in his individual capacity,)	
)	
Defendants.)	

OPINION AND ORDER

Now before the Court is Plaintiffs' Motion for Hearing Certifying Frivolousness of Defendants' Appeal and Lifting of Stay (Dkt. # 58). Plaintiffs filed their complaint (Dkt. # 2) on April 21, 2005, alleging that they were terminated from their jobs in retaliation for their political affiliation and political speech/conduct related to their participation in a political campaign of a candidate for County Commissioner, in violation of their First Amendment rights. Defendants filed a motion for summary judgment (Dkt. # 27) on June 1, 2006 alleging, in part, that they were entitled to judgment as a matter of law on the basis of qualified immunity. This Court denied defendants' motion for summary judgment on September 18, 2006. Dkt. # 44. Defendants filed a notice of appeal on September 25, 2006 on the issue of qualified immunity. Dkt. # 45. The Court stayed the case, pending resolution of the Tenth Circuit appeal. Dkt. # 53.

Plaintiffs now argue that defendants' interlocutory appeal is frivolous and that this Court should exercise concurrent jurisdiction over the case with the Tenth Circuit. They argue that defendants have misused the interlocutory appeal in an effort to delay proceedings. Plaintiffs

request a hearing regarding the frivolousness of defendants' appeal. The Court finds that no hearing is needed and that there is no need to lift the stay prior to the Tenth Circuit's decision.

As defendants' noted in their response, the Tenth Circuit retains appellate jurisdiction over some orders, including orders on qualified immunity, before final judgment. See Cohen v Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). Here, whether defendants' appeal is frivolous is currently before the Tenth Circuit, which is considering sua sponte summary dismissal of defendants' appeal for lack of appellate jurisdiction. If the Tenth Circuit determines that it does not have jurisdiction to hear the appeal, then this Court will proceed with the case in a timely manner. If, however, the Tenth Circuit determines that it has jurisdiction to hear the appeal, then it will decide the qualified immunity issue, and the stay is appropriate. Thus, there is no reason for this Court to decide, at this point, whether it should retain concurrent jurisdiction. Thus, the Court denies plaintiffs' motion.

IT IS SO ORDERED that Plaintiffs' Motion for Hearing Certifying Frivolousness of Defendants' Appeal and Lifting of Stay (Dkt. # 58) is **denied**.

DATED this 15th day of December, 2006.



CLAIRES V. EAGAN, CHIEF JUDGE
UNITED STATES DISTRICT COURT